KETUA PENGARAH HASIL DALAM NEGERI A

v.

PERBADANAN KEMAJUAN EKONOMI NEGERI JOHOR

COURT OF APPEAL, PUTRAJAYA B
MOHD GHAZALI YUSOFF JCA
LOW HOP BING JCA
VINCENT NG JCA
[CIVIL APPEAL NO: J-01-61-2002]
10 APRIL 2009 C

REVENUE LAW: *Income tax - Deduction - Apportionment formula - Whether lawful and applicable - Daya Leasing Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri - Income Tax Act 1967, ss. 5, 33(1), 44(6)* D

REVENUE LAW: *Income tax - Interpretation of 'income' - Whether gross or chargeable income - Whether exemptions to be given at gross or chargeable income level - Income Tax Act 1967, ss. 2, 127(5)*

The appellant was the Director General of Inland Revenue and E
the respondent was a statutory body incorporated under the Johor State Enactment No. 4 of 1968. The respondent's principal activities were to develop land for industrial, agricultural, property, mining, logging and other corporate activities. It had two sources F
of income, *ie*, business and dividend. The Minister of Finance granted exemptions from payment of taxes for all income for the years 1980 to 1990 but for the year 1991 and the years 1992 to 1996, exemptions were not given for dividend income and development tax. In 1990 and 1991 the respondent made gifts of G
money to the State Government of Johor and claimed deductions for them from its non-exempt dividend income. The appellant allowed the deductions under s. 44(6) of the Income Tax Act 1967 (the 'Act') but applied an apportionment formula and accordingly issued two notices of assessment, ie, for the year of assessment 1991 – the tax payable was given as RM2,824,507.62 H
and for the year of assessment 1992 – the tax payable was given as RM1,978,744.94. The respondent, unhappy with the assessment, appealed to the Special Commissioners of Income Tax. The Special Commissioners delivered a deciding order revising the two notices of assessment on the ground that the appellant's I

A computations were wrong. The appellant appealed to the High Court but the High Court affirmed the deciding order. The appellant now appealed before the Court of Appeal

Held (allowing the appeal)

B **Per Low Hop Bing JCA:**

(1) Section 127(5) of the Act allows any income exempt from tax by virtue of s. 127, such as business income in the instant appeal, to be disregarded for the purposes of the Act. Section 2(2) makes a general reference to 'income'. The general C reference to the word 'income' in s. 2(2) is highly volatile as the precise meaning of the word 'income' is to be dictated by reference to the context and circumstances. Section 5 helps to illuminate the meaning of the word 'income' to a great extent, by setting up the various types of income for the D purpose of ascertaining chargeable income. Gross income and chargeable income are polarised. Consequently, the meaning to be attributed to the word 'income' would affect the tax liability of the taxpayer. (paras 18, 19, 20, 21 & 22)

E **(2)** To be disregarded under the Act, an exemption from tax should be legally deducted or claimed from the chargeable income and not the gross income. This is because gross income per se may or may not be exigible to tax at all. When no tax is exigible, there is no question or necessity for the F taxpayer to utilise or claim the exemption. In the context of s. 127(5), exemption means immunity, dispensation, exclusion, freedom, relief or exoneration from tax. (para 23)

(3) It is essential to hark back to the simple and basic rule that G 'income tax is a tax on income'. Where there is no income, there can be no liability to tax, in which case no question of exemption can ever arise. Exemption is only relevant when there is chargeable income but not otherwise. (para 24)

H **(4)** A tax exemption is only given after liability to tax has been determined. It therefore follows that the word 'income' means 'chargeable income' and hence tax exemption is given at the chargeable income level. (para 26)

I

(5) The factual matrix in the case of *Daya Leasing Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* had substantial similarity to the factual background in the instant appeal, particularly in relation to the two unidentifiable sources of income, *ie*, the non-exempt dividend income and the exempt business income. Applying the apportionment formula in that case, the appellant's apportionment for the deduction of the gifts of money between the respondent's non-exempt dividend income and the exempt business income was justified and lawful. Under s. 44(6) of the Act, gifts of money are deductible from the taxpayer's aggregate income. In line with the steps set out in s. 5 and the apportionment implied in s. 33(1), the appellant had produced an apportionment formula to effectively apportion the gifts of money between the non-exempt dividend income and the exempt business income. For that purpose, gifts of money made to the State Government of Johor and claimed by the respondent as deductions under s. 44(6) were apportioned accordingly. The total amount of the gifts claimed by the respondent could not be allowed against only one source of income when the aggregate income of the respondent consisted of the business and the dividend incomes. The apportionment formula used by the appellant was completely consistent with the approach adopted and recognised by this court in the case of *Daya Leasing*. (paras 31 & 32)

Bahasa Malaysia *Translation Of Headnotes*

Perayu adalah Ketua Pengarah Hasil Dalam Negeri sementara responden pula sebuah badan berkanun yang ditubuhkan di bawah Enakmen Negeri Johor No. 4 tahun 1968. Aktiviti utama responden adalah membangunkan tanah untuk tujuan-tujuan industri, pertanian, hartanah, perlombongan, pembalakan serta aktiviti korporat lain. Responden mempunyai dua sumber pendapatan, iaitu dari perniagaan dan dividen. Menteri Kewangan telah memberikan pengecualian cukai ke atas semua pendapatan bagi tahun-tahun 1980 hingga 1990, tetapi bagi tahun 1991 dan tahun-tahun 1992 hingga 1996, pengecualian tidak diberi bagi pendapatan dari dividen dan cukai pembangunan. Bagi tahun-tahun 1990 dan 1991, responden telah menderma sejumlah wang kepada Kerajaan Negeri Johor dan telah menuntut penolakan baginya untuk pendapatan dividen yang tidak dikecuali cukai. Perayu

membenarkan penolakan di bawah s. 44(6) Akta Cukai Pendapatan 1967 ('Akta') tetapi dengan menggunapakai formula pengagihan, dan berikutnya mengeluarkan dua notis taksiran, iaitu, bagi tahun taksiran 1991 cukai yang perlu dibayar adalah berjumlah RM2,824,507.62 sementara bagi tahun taksiran 1992 pula cukainya adalah RM1,978,744.94. Tidak berpuas hati dengan taksiran, responden merayu kepada Pesuruhjaya Khas Cukai Pendapatan. Pesuruhjaya Khas, dalam memberikan perintah keputusannya, telah menyemak kedua-dua notis taksiran atas alasan bahawa perkiraan perayu adalah silap. Perayu merayu ke Mahkamah Tinggi namun perintah keputusan telah disahkan oleh Mahkamah Tinggi. Perayu kini merayu ke Mahkamah Rayuan.

Diputuskan (membenarkan rayuan)
Oleh Low Hop Bing HMR:

(1) Seksyen 127(5) Akta membenarkan mana-mana pendapatan yang dikecualikan dari cukai di bawah s. 127, seperti pendapatan perniagaan di dalam rayuan semasa, tidak diambilkira bagi maksud Akta. Seksyen 2(2) membuat ruujukan am kepada 'pendapatan'. Rujukan am kepada perkataan 'pendapatan' di dalam s. 2(2) adalah sangat volatile kerana maksud sebenar perkataan 'pendapatan' adalah ditentukan dengan merujuk kepada konteks dan juga keadaan. Seksyen 5 amat membantu dalam menjelaskan maksud perkataan 'pendapatan', iaitu dengan cara menyenaraikan jenis-jenis pendapatan bagi maksud menentukan pendapatan yang boleh dicukai. Pendapatan kasar dan pendapatan yang boleh dicukai adalah bertentangan (polarized). Oleh itu, maksud yang boleh diberi kepada perkataan 'pendapatan' akan memberi kesan ke atas ketertanggungan cukai seseorang pembayar cukai.

(2) Suatu pegecualian cukai, untuk tidak diambil kira di bawah Akta, haruslah boleh ditolak atau dituntut dengan sahnya dari pendapatan yang boleh dicukai dan bukannya dari pendapatan kasar. Ini kerana pendapatan kasar per se mungkin sahaja boleh atau tidak tertakluk kepada cukai. Bilamana tiada cukai boleh dipotong, maka tidak timbul persoalan atau keperluan pembayar cukai menggunakan atau menuntut pengecualian. Dalam konteks s. 127(5), pengecualian bermakna imuniti, pengagihan, penyisihan, kebebasan, relif atau pelepasan daripada cukai.

(3) Adalah penting untuk kembali kepada kaedah asas yang mudah bahawa 'cukai pendapatan adalah cukai ke atas pendapatan'. Di mana pendapatan tidak wujud, maka tidak ada liabiliti terhadap cukai, dan sekaligus tidak berbangkit soal pengecualian. Pengecualian hanyalah relevan bilamana terdapat pendapatan yang boleh dicukai dan tidak sebaliknya.

(4) Suatu pengecualian cukai hanya diberi selepas ditentukan dahulu liabiliti terhadap cukai. Ianya mengikut bahawa perkataan 'pendapatan' bermaksud 'pendapatan boleh dicukai' yang bermakna pengecualian cukai hanya diberi di peringkat pendapatan boleh dicukai.

(5) Urutan fakta di dalam kes *Daya Leasing Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* mempunyai banyak persamaan dengan latarbelakang fakta rayuan semasa, terutama berhubung dengan dua punca pendapatan yang tak dikenalpasti, iaitu pendapatan dividen yang tidak dikecualikan dan pendapatan perniagaan yang dikecualikan. Menggunapakai formula pengagihan di dalam kes tersebut, pengagihan yang dibuat perayu bagi penolakan wang derma di antara pendapatan dividen responden yang tidak dikecualikan dan pendapatan perniagaannya yang dikecualikan adalah wajar dan sah. Di bawah s. 44(6) Akta, pendermaan wang adalah boleh ditolak dari pendapatan agreget pembayar cukai. Juga selaras dengan langkah-langkah yang diutarakan oleh s. 5 serta pengagihan tersirat s. 33(1), perayu telah mengemukakan suatu formula pengagihan yang mengagih dengan berkesannya pendermaan wang di antara dividen yang tidak dikecualikan dan pendapatan perniagaan yang dikecualikan. Bagi maksud ini, pendermaan wang yang dibuat kepada Kerajaan Negeri Johor dan dituntut secara tolakan oleh responden di bawah s. 44(6) telah diagihkan dengan betulnya. Jumlah keseluruhan derma yang dituntut oleh responden tidak boleh dibenar terhadap hanya satu sahaja sumber pendapatan apabila pendapatan agreget responden mengandungi pendapatan-pendapatan dari perniagaan dan juga dividen. Formula pengagihan yang digunakan oleh perayu adalah sepenuhnya konsisten dengan pendekatan yang digunapakai dan diperakui oleh mahkamah ini di dalam kes *Daya Leasing*.

A **Case(s) referred to:**
County Council v. AG [1901] AC 26 ***(refd)***
Daya Leasing Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2005] 2 CLJ 449 CA ***(foll)***
Ketua Pengarah Hasil Dalam Negeri v. MCI Society Ltd [2000] MSTC 3,792 ***(refd)***
B *Lower Perak Co-operative Society v. Ketua Pengarah Hasil Dalam Negeri [1994] 3 CLJ 541 SC* ***(refd)***
MCI Society Ltd v. Ketua Pengarah Hasil Dalam Negeri [1995] MSTC 2,272 ***(refd)***
Raja's Commercial College v. Gian Singh & Co Ltd [1976] 2 MLJ 41 ***(refd)***
C
Legislation referred to:
Income Tax Act 1967, ss. 2(2), 5, 33(1), 44(6), 127(5)

Other source(s) referred to:
VS Sundaram's, *Law of Income Tax in India,* 12th edn, vol 1, p 570
D
For the appellant - Hazlina Hussain (Mohd Harris Hanapi & Zaleha Adam with him)
For the repondent - Md Ali Zaitun (Kunasegaran with him); M/s Ali Zaitun & Baharudin

E *[Appeal from High Court, Johor Bahru; Civil Appeal No: 14-01-1999]*

Reported by Usha Thiagarajah

F **JUDGMENT**

Low Hop Bing JCA:

Appeal

G **[1]** On 30 April 1999, the Special Commissioners of Income Tax ("the Special Commissioners") delivered a deciding order to the effect that the computations by the appellant, the Director General of Inland Revenue ("the Revenue") were wrong and so revised the Revenue's two notices of assessment.

H **[2]** The Revenue, being dissatisfied, requested the Special Commissioners to state a case for the opinion of the High Court.

[3] The High Court affirmed the Special Commissioners' deciding order with costs.

I

[4] The revenue has now appealed to this court.

Factual Background

[5] The respondent ("the taxpayer") is a statutory body incorporated under the Johor State Enactment No. 4 of 1968.

[6] The taxpayer's principal activities are to develop land for industrial, agricultural, property, mining, logging and other corporate activities.

[7] The taxpayer has two sources of income *viz* business and dividend.

[8] In exercise of the powers under s.127 of the Income Tax Act 1967 ("the Act"), the Minister of Finance granted to the taxpayer the following exemptions from payment of taxes:

Year of Assessment	Exemption
1980 to 1990	All income.
1991	All income except dividend income and development tax.
1992 to 1996	All income except dividend income and development tax.

(For brevity and convenience, a reference hereinafter to a section is a reference to that section in the Act).

[9] The instant appeal concerns the exemptions for only two years of assessment *viz* 1991 and 1992.

[10] In 1990 and 1991, the taxpayer made gifts of money to the State Government of Johor and claimed deductions for them from the taxpayer's non-exempt dividend income.

[11] Although the Revenue had, under s. 44(6), allowed the deductions claimed by the taxpayer, the Revenue had applied an apportionment formula and apportioned the deductions between the taxpayer's non-exempt dividend income and the exempt business income. Consequently, the Revenue issued two notices of assessment, both dated 20 November 1995, and raised assessments on the taxpayer as follows:

Year of Assessment	Tax payable
1991	RM2,824,507.62
1992	RM1,978,744.94

[12] As alluded to above, the Special Commissioners had on the taxpayer's appeal revised these two notices of assessment, and the High Court had affirmed the Special Commissioners' deciding order.

[13] In the instant appeal, the parties shared a common ground in raising three questions for determination *viz* the meaning of the word "income", the exemption and the apportionment formula.

Meaning Of "Income" Under s. 127(5)

[14] The first question is whether the word "income" in s. 127(5) means gross income or chargeable income. The second question is whether the exemptions of payment of income tax are to be given at the gross income level or the chargeable income level. These two questions may be conveniently considered together.

[15] The Revenue's learned legal officer, Ms Hazlina bt Hussain (assisted by Mr Mohd Harris bin Hanapi and Ms Zaleha bt Adam) submitted that the word "income" means chargeable income and not gross income, based on:

(1) *MCI Society Ltd v. Ketua Pengarah Hasil Dalam Negeri* [1995] MSTC 2,272;

(2) *Ketua Pengarah Hasil Dalam Negeri v. MCI Society Ltd* [2000] MSTC 3,792 CA; and

(3) *Lower Perak Co-operative Society v. Ketua Pengarah Hasil Dalam Negeri* [1994] 3 CLJ 541 SC.

[16] Learned counsel Mr. Md Ali bin Zaitun (Mr. Kunasegaran with him) responded for the taxpayer that the word "income" means gross income, and contended that in *MCI Society, supra*, the relevant judgments were silent on the meaning of the word "income", while *Lower Perak Co-operative Society, supra*, is distinguishable, as co-operative societies have to seek exemption under para 6 of the Schedule to the Act, while the exemption granted in favour of the taxpayer in the instant appeal is as of right.

[17] My analysis of the relevant factual background reveals that for the years of assessment 1991 and 1992, the exemption did not include dividend income.

[18] Section 127(5) allows any income which is exempt from tax by virtue of s. 127, such as business income in the instant appeal, to be disregarded for the purposes of the Act. It reads as follows:

> (5) Any income which is exempt from tax by virtue of this section shall be disregarded for the purposes of this Act:
>
> Provided that:
>
> (a) [not relevant]; and
>
> (b) [not relevant].

[19] Section 2(2) makes a general reference to "income" in the following words:

> (2) Any reference in this Act to income shall, if the income is not described as being income of a particular kind, be construed as a reference to income generally or to gross, adjusted, statutory, aggregate, total or chargeable income as the context and circumstances may require.

[20] The general reference to the word "income" in s. 2(2) is highly volatile, as the precise meaning of the word "income" is to be dictated by reference to the context and circumstances. "It is a word difficult and perhaps impossible to define in a precise general formula.": V.S. Sundaram's *"Law of Income Tax in India"*, 12th edn. vol. 1 p. 570, applied in *MC1 Society, supra,* by the Special Commissioners who added that "It has different meanings in the different sections of the Act."

[21] Section 5 helps to illuminate the meaning of the word "income" to a great extent, by setting out the various types of income, for the purpose of ascertaining chargeable income. The "Graphic representation of the system" of ascertaining the "Total Income from a Business" at p. 275 of Dr. Arjunan Subramaniam's "Malaysian Taxation System 2003" is comprehensive and merits reproduction as follows:

A *Total Income From A Business*

Graphic Representation Of The System

Gross income – section 2
less
Allowable expenses – section 33
equals
Adjusted income – section 41
plus
Balancing charges – section 42
less
Capital allowances – section 42
equals
Statutory income – section 42
less
Business losses brought forward from previous years – section 43(2)
plus
Statutory income from other sources-section 43(1)(b)
plus
Recoveries from prospecting expenditure or qualifying farm expenditure – section 43(1)(c)
equals
Aggregate income

less

* Adjusted business loss for the current year – section 44(2) * Mining expenditure – Schedule 4 * Farm expenditure – Schedule 4A * Pre-operational business expenditure – Schedule 4B or 4C, loss * Approved donations – sections 44(6), 44(6A), 44(8), (9), (10), (11)

equals

Total Income

less

Personal reliefs (for a resident individual) sections 46 to 49

equals

Chargeable income – section 45

[22] This graphic representation shows that gross income and chargeable income are polarised. Consequently, the meaning to be attributed to the word "income" would affect the tax liability of the taxpayer.

[23] To be disregarded under the Act, an exemption from tax should legally be deducted or claimed from the chargeable income and not the gross income. This is because gross income *per se* may or may not be exigible to tax at all. When no tax is exigible, there is no question or necessity for the taxpayer to utilise or claim the exemption. In the context of s. 127(5), exemption means immunity, dispensation, exclusion, freedom, relief or exoneration from tax (see *"The New Oxford Thesaurus of English"* 2000).

[24] It is essential to hark back to the simple and basic rule that "income tax is a tax on income": per Lord Macnaghten in *London County Council v. AG* [1901] AC 26; *Raja's Commercial College v. Gian Singh & Co. Ltd* [1976] 2 MLJ 41 PC; and *Lower Perak Co-operative Housing Society Bhd, supra.* In other words, where there is no income, there can be no liability to tax, in which case no question of exemption can ever arise. Exemption is only relevant when there is chargeable income, but not otherwise.

[25] Strong support for my view may be found in *Lower Perak Co-operative Housing Society Bhd, supra,* at p. 752 where the Supreme Court, speaking through Edgar Joseph Jr SCJ (as he then was) held that a tax exemption is only given after liability to tax has been determined, as clarified in the following passage:

> Where its business dealings result in a profit which is income, liability to income tax arises, subject to the right of a co-operative society to claim exemption under para 12 of Sch 6 for the first five years of its trading or business dealings. In other words, there must be liability to income tax first and then only the question of claiming exemption under 12 of Sch 6 arises.

[26] I therefore uphold the submission presented for the Revenue that the word "income" means "chargeable income" and, hence, tax exemption is given at the chargeable income level. In the circumstances, I am unable to accept the aforesaid argument advanced for the taxpayer.

Revenue's Apportionment Formula

[27] The third and final question is whether the Revenue's apportionment formula is lawful and applicable.

[28] The Revenue relied on *Daya Leasing Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2005] 2 CLJ 449 CA, to support the submission that as the exemption does not include dividend income, it is necessary for the Revenue to apportion the taxpayer's chargeable income between dividend income and business income and apply the apportionment formula to the gifts of money between the non-exempt dividend income and the exempt business income.

[29] The taxpayer argued that the facts in *Daya Leasing, supra*, are different in that Daya Leasing ran two types of business namely *viz* leasing business and non-leasing business, but the two businesses shared common expenses like rental, staff salaries etc and as the expenses are common to both the businesses, the expenses deductible from the businesses are unidentifiable.

[30] I would now put in proper perspective the facts in *Daya Leasing, supra.* The taxpayer there was engaged in giving leasing, factoring and hire purchase financing facilities. There were expenses and interest payments on loans from the taxpayer's holding company common to both the leasing and non-leasing

businesses which required apportionment between the two sources. The taxpayer was unable to specifically attribute the exact amount of the common expenses to the respective leasing and non-leasing businesses. The Revenue's formula for apportionment of the common expenses included the entire lease rentals, *viz* both the interest and capital elements, ignoring the capital element in the lease rentals. The taxpayer argued that it was only the interest element that had to be taken into account in respect of the gross income of the leasing business in line with the manner of ascertaining the gross income of the non-leasing business. The majority of the Special Commissioners upheld the Revenue's apportionment formula. However, the High Court disagreed and held that the principal should not be taken into account for the apportionment of the common expenses in lease financing as there was no provision in the Act, or the Income Tax (Leasing) Regulations 1986, to prescribe the manner of doing so in respect of different income sources. The Revenue's appeal was allowed by the Court of Appeal. In setting aside the High Court decision, the Court of Appeal affirmed the Special Commissioners' majority view. The Court of Appeal held, *inter alia*, that the common expenses incurred had to be apportioned as implied in s. 33(1) and so the Revenue's apportionment was in compliance with the law: per Augustine Paul JCA (now FCJ) at p. 464 c-d. At p. 463, the Court of Appeal provided the reasons as follows:

> Where there are two or more sources of income for a person and the expenses are identifiable and separable there will be no difficulty in ascertaining the adjusted income for each source. However, there will be instances when the expenses of two or more sources are not separable as they are common to the sources. As s. 33(1) of the Act requires a deduction of the expenses of a source from the gross income of that source for the purposes of ascertaining the adjusted income of the sources the question that arises for determination is whether the section empowers the appellant to apportion the expenses. The power to apportion the expenses can be implied in s. 33(1) of the Act in view of the need to ascertain the adjusted income … If s. 33(1) is to be strictly construed the appellant will be unable to identify the expenses separately where they are mixed with the result that the adjusted income of the sources cannot be ascertained. This will defeat the object of s. 33(1) and bring the machinery of tax assessment to a halt. This will not happen in the interpretation of ordinary statutes as one of the salutary canons of construction in

A such cases is that Parliament does not act in vain. The courts lean against a construction which reduces a statute to futility. A statute must be so construed so as to make it effective and operative on the principle expressed in the maxim *ut res magis valeat quam pareat* (that the thing may rather have effect than be destroyed in order that the thing may be valid rather than invalid).

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[31] The factual matrix in *Daya Leasing*, *supra*, bears substantial similarity to the factual background in the instant appeal, particularly in relation to the two unidentifiable sources of income eg the non-exempt dividend income and the exempt business
C income in the instant appeal. Applying the apportionment formula in *Daya Leasing*, *supra,* to the instant appeal, I am of the view that the Revenue's apportionment of the deduction for the gifts of money between the taxpayer's non-exempt dividend income and the exempt business income is justified and lawful. Under s. 44(6),
D gifts of money are deductible from the taxpayer's aggregate income. Section 5 which sets out the requisite steps, as simplified in the *"Graphic representation", supra,* may now be narrowed down as follows:

E

Gross Income
less
Allowable Expenses

F

equals
Adjusted Income
less

G

Capital Allowances
equals

H

Statutory Income
less
Unabsorbed Business losses brought forward

I

equals
Aggregate Income

less

Approved business donations and current business losses

equals

Total Income

less

Personal reliefs (individuals)

equals

Chargeable Income Apply Tax Rate Tax Payable

[32] In line with the steps set out in s. 5 and the apportionment implied in s. 33(1), the revenue has produced an apportionment formula to effectively apportion the gifts of money between the non-exempt dividend income and exempt business income. For this purpose, gifts of money made to the State Government of Johor and claimed by the taxpayer as deductions under s. 44(6) were apportioned accordingly. The total amount of the gifts claimed by the taxpayer could not be allowed against only one source of income when the aggregate income of the taxpayer consists of the business income source and the dividend income source. The apportionment formula used by the Revenue is completely consistent with the approach adopted and recognised by this court in *Daya Leasing, supra.* The answer to the third and final question is therefore in the affirmative.

Conclusion

[33] On the foregoing grounds, the deciding order of the Special Commissioners, and the High Court judgment affirming it, are erroneous and unsustainable. Hence, this appeal is allowed with costs. The deciding order and the High Court judgment are set aside. The revenue's apportionment formula and two notices of assessment are upheld. Deposit to be refunded to the Revenue as appellant.

A **[34]** My learned brothers Mohd Ghazali bin Mohd Yusoff and Vincent Ng Kim Khoay, JJCA have read this judgment in draft and have expressed their agreement to make it the judgment of the court.

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